

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 22-10943-mew

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5 In the Matter of:

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7 Voyager Digital Holdings, Inc.

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9 Debtor.

10 - - - - - x

11 United States Bankruptcy Court

12 One Bowling Green

13 New York, NY 10004

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15 March 15, 2023

16 2:03 PM

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21 B E F O R E :

22 HON MICHAEL E. WILES

23 U.S. BANKRUPTCY JUDGE

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25 ECRO: KAREN

1 HEARING re Motion for Stay Pending Appeal

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P R O C E E D I N G S

MR. FOGELMAN: Your Honor, good afternoon again.

This is Larry Fogelman, and the Government is ready to proceed. There are others in the courtroom who can identify themselves.

MR. MORRISSEY: Good afternoon, Your Honor.

Richard Morrissey for the Trustee. I am also in the courtroom.

MS. SCHWARTZ: And, Your Honor, Andrea Schwartz

with the U.S. Trustee in the courtroom and are on listen only.

THE COURT: Okay, very good. Once again, I apologize. This is entirely my fault for the confusion about how this would be conducted. But I just realized I wasn't going to be able to absorb everything last night and would have to spend the morning doing so and didn't want to use the time to commute.

I've read the Government's papers, I've read the Debtor's and Committee's papers, and I have some questions before I hear anything further.

Number one, Mr. Slade, in the original proposed confirmation order that was filed on February 28th, there was a paragraph that said that the exculpation would not provide -- not apply to the Government. Now, I never saw such a limitation in the plan itself. And obviously you've

1 changed that approach more than 180 degrees, I would say, in
2 the next version of the confirmation order that you filed
3 two days later. Where did that original provision come
4 from? Did you have negotiations with the Government and
5 initially agree to include that?

6 MR. SLADE: There were a lot of negotiations
7 between us and the Government, Your Honor. I can't remember
8 which version that you are speaking of right now. I do
9 recall having discussions with the Government and then
10 trying to have them clarify what they were trying to
11 preserve. And then we had further discussions related to
12 the impact of the bar date, and we wanted to make sure that
13 we were clear that because the bar date order had been
14 entered and a number of the entities that were engaging with
15 us about the plan had not filed claims, that nothing in the
16 plan or the confirmation order would eliminate whatever
17 rights that they lost by not filing the claim by the
18 governmental bar date.

19 And it was at that point in time when basically
20 based on their statements about what they might do in the
21 future, we determined that we needed to make clear that once
22 we actually implemented the plan, we were going to be able
23 to do so free from interference until and unless the
24 Government actually came out with substantive new rules that
25 we could follow going forward. And that led to the language

1 that I think Your Honor pointed out was perhaps a little
2 overstated in the plan. But there were a number of
3 negotiations with a number of different governmental
4 agencies, including Mr. Morrissey's office. I don't recall
5 speaking with Mr. Fogelman until the confirmation hearing,
6 but we did speak with a number of different federal and
7 state agencies, and that led to different versions of the
8 exculpation plan being proposed.

9 THE COURT: The language I have in mind is in
10 Paragraph 141 of the first proposed version of the
11 confirmation order that was filed on February 29th. It was
12 at Docket Number 1120. And it says, "Nor shall anything in
13 the confirmation order or the plan exculpate any such
14 party," referring to various people, "from any liability to
15 the United States or any of its agencies arising under the
16 Internal Revenue Code, the environmental laws, or any
17 similar criminal laws of the United States or under any
18 rules or regulations enforced by the United States." That's
19 pretty much the end of the relevant language.

20 The Government kind of hinted yesterday that it
21 was taken aback or surprised by the exculpation that you
22 sought. And I couldn't tell whether this was something you
23 had agreed to with the Government and that you had changed
24 your mind, whether it's an accident that it appeared in
25 there. The limitation never appeared in the versions of the

1 plan that were filed. So where did this language come from
2 and how is it that it got included and not immediately
3 withdrawn?

4 MR. SLADE: I've got to be honest, I don't know
5 the answer to that question. Maybe one of my colleagues on
6 the phone knows. I was not involved in the negotiations
7 that led to that version of the confirmation order.

8 MS. SMITH: Him, Your Honor. It's Allyson Smith
9 at Kirkland. The language had been negotiated with the FTC.
10 And that was why it was originally included. But then as
11 Mr. Slade said, once it became clear that governments may
12 try to retroactively assert actions, we did do -- we did
13 pivot a bit.

14 THE COURT: Okay. All right. Wasn't something
15 you negotiated with Mr. Morrissey or with the United States
16 Trustee or with the United States Attorney's Office?

17 MS. SMITH: Not that I recall.

18 MR. MORRISSEY: Your Honor, this is Richard
19 Morrissey. I believe -- and Ms. Smith can correct me if I'm
20 wrong on this -- but I believe another intervening factor
21 that led to the change of the language during the hearing
22 was something that the Securities and Exchange Commission
23 counsel had said as well. So I don't want to leave out any
24 of the agencies or parties involved. So counsel to the
25 Debtors can confirm or deny that that might have played a

1 role in the fact that we were taken aback, again, by the
2 change in the proposed order in Paragraph 141.

3 THE COURT: There's -- well, I don't think there's
4 any question that you were taken aback by the breadth of
5 what the Debtors proposed on March 2nd. I'm not disputing
6 that. I'm just turning to that original provision and
7 whether you were somehow taken aback by the whole idea that
8 exculpation would apply to the government. Because all of
9 the filed versions of the plan had no exclusions for the
10 government. It's just this one draft of the confirmation
11 order in which that language appeared and then taken out in
12 the next -- or certainly (indiscernible).

13 MR. SLADE: Yeah. I can confirm I don't think
14 anybody had any discussion with Mr. Fogelman or his group
15 before the confirmation hearing. I'm not aware of any such
16 discussions.

17 MR. FOGELMAN: Your Honor, I've been supervising
18 this case until quite recently, and now I'm more actively
19 involved in it. I can tell you if the FTC negotiated for
20 that language, the FTC is part of the United States and
21 certainly inured to our benefit. We became more involved in
22 the case -- look, earlier in this case, we had just filed a
23 notice on behalf of CFIUS. And my colleague, J.D. Barnea,
24 was the primary attorney working on the case at that time.

25 And that said, again, that the FTC asked for it

1 and it was included inure to our benefit. And we became
2 very involved, again, when we saw that that language had
3 been stricken because that was a substantial concern to us,
4 Your Honor.

5 THE COURT: Well, you did nothing until after --
6 none of -- this language wasn't even on file until after the
7 objection deadline. Nice try to kind of put everybody and
8 the Government in the same boat, but I'm not going to accept
9 the idea that you, the U.S. Attorneys Office, or the Justice
10 Department somehow knew -- even knew or were relying on any
11 of the discussions with the FTC, which apparently doesn't
12 have any problem with what I've done.

13 MR. FOGELMAN: I'm not asserting, Your Honor, that
14 the Government had been directly involved in those
15 negotiations. Those are what they are. But at the end of
16 the day, the Debtors put in an illegal provision in the
17 confirmation order that substantially prejudices the United
18 States that was not there the day that the confirmation
19 hearing started. And it was removed -- that protection for
20 the Government was removed. And we think that is absolutely
21 wrong. Even in the Aegean case, which this Court has relied
22 on, which the Debtors have relied on, the government had a
23 carveout from exculpation that we quoted in our brief.

24 THE COURT: But there was no such carveout in any
25 of the versions of the plan that were on file, to which you

1 didn't object. And there hasn't been such a carveout in
2 many of the bankruptcy cases, which you know.

3 And so you say these things as though the whole
4 idea that you are being subject to an exculpation came as a
5 surprise to you. Nonsense. It was there in the original
6 plan all along.

7 MR. FOGELMAN: Well, Your Honor, perhaps we should
8 have raised it sooner. I appreciate that point and I
9 certainly hear Your Honor on that. But at the end of the
10 day, we did file an objection. We had permission from the
11 Court to file it. We raised the issue with the Court as
12 soon as it came up. The day that that exculpation provision
13 -- sorry, the carveout from exculpation, the day that
14 language was withdrawn, we filed an immediate letter to the
15 Court alerting the Court to that concern. We asked for
16 permission to brief that issue. We received permission to
17 brief it, and we briefed it. And I don't think the fact
18 that we perhaps could have asked for it sooner speaks in any
19 way to the merits here.

20 THE COURT: Okay. But you keep saying that as
21 though it was the removal of this carveout language that
22 prompted you to act whereas the carveout language didn't
23 even exist, there was no confirmation order or proposed
24 order on filed up to the time of the objection deadline.
25 And you said nothing. And what actually prompted you to act

1 was not the removal of this language, but the more explicit
2 proposed additional language that the Debtor suggested,
3 which would have said -- which would have barred the
4 Government from ever contenting that anything that was done
5 was illegal in any way. That's what kind of got you off of
6 your feet and made you file an objection, isn't it?

7 MR. FOGELMAN: Your Honor, those two things
8 happened at the same time. The carveout from exculpation
9 was removed on the same day, the first day of the
10 confirmation hearing that the --

11 THE COURT: Here's what I'm trying to get at. You
12 implied several times that you've got lack of notice and
13 that it was only because the qualifying language was removed
14 that you acted. I think that's false. I think you did
15 nothing and were doing nothing until the Debtors overreached
16 and asked for additional things on March 2nd. I suspect you
17 didn't even know about this qualifying language. That's
18 what I am asking you.

19 So tell me, did you actually know about this
20 language and were you relying on it?

21 MR. FOGELMAN: I can't speak for what my
22 colleagues who have been handling this case knew and when he
23 knew it. I don't dispute, Your Honor, that we have had
24 notice of this case and that we did file a notice for CFIUS.
25 And so to the extent that the Court is asking if we are

1 aware, I think, yes, we were certainly aware of all of the
2 filings that have happened INTERPRETER: his case. And as
3 Your Honor said, we perhaps should have acted quicker and
4 asked for more affirmative language in this case. We
5 didn't. But there was language that was negotiated by
6 another federal entity. And so I don't dispute, Your Honor,
7 that we were fully aware of this case and the various
8 filings in it. And I think -- you know, I certainly take
9 Your Honor's point that we did not raise an issue sooner.

10 THE COURT: Okay. So I'm not saying you're
11 foreclosed from making an argument. I'm just saying that
12 your argument that somehow this was new to you, this entire
13 issue was new to you on March 2nd or that you had previously
14 been relying on what that confirmation order allegedly said,
15 you've suggested both those things, and I don't think
16 they're true.

17 MR. FOGELMAN: Let me be clear, Your Honor. I
18 don't think we were relying on any particular language in
19 advance of it being entered into the confirmation order. We
20 didn't ask for it. So I certainly agree with Your Honor on
21 that point. It was the FTC -- and again, I was not
22 involved. The FTC has independent litigating authority. So
23 they did what they did. So I just want to make sure that --
24 I want to be a hundred percent candid and clear with the
25 court. I am not taking the position that we were relying on

1 any carveout from exculpation. And I think Your Honor is
2 right that we certainly became focused and aggrieved by it
3 when we saw what had been removed and what had been inserted
4 on that same --

5 THE COURT: No question. I understand your
6 concerns about the language that the Debtors proposed.

7 MR. FOGELMAN: Yes.

8 THE COURT: I didn't give them what they proposed.
9 It was excessive. It was overreaching. I agree a hundred
10 percent. And I agree that it went so far beyond what they
11 had originally proposed, that as to that language, you
12 didn't have proper notice. I agree with all that. But I
13 just --

14 MR. FOGELMAN: And again, I just want to make sure
15 I'm candidly addressing Your Honor's concerns and being a
16 hundred percent forthright with Your Honor. If you have any
17 further concerns along those lines, I would like to address
18 them right now. Because certainly I'm not trying to imply
19 something that didn't happen. And if in any way my language
20 may have conveyed that, I apologize. I certainly did not
21 mean to do that. And I'm happy to just make clear exactly
22 what we did and how we did it. And I am not trying to
23 assert that --

24 THE COURT: You have explicitly argued that you
25 didn't get sufficient notice. And I just don't see it.

1 MR. FOGELMAN: Well, I think if they were going to
2 remove that exculpation carveout that was in the
3 confirmation order, they should have told us that before the
4 confirmation hearing. And it prejudiced our ability to
5 prepare papers and to object to the plan.

6 THE COURT: But you didn't even know about the
7 carveout. You just told me you didn't even know about it.
8 So how were you prejudiced? It wasn't even a part of any
9 discussions with you. You didn't know about it.

10 MR. FOGELMAN: That's fair, Your Honor. And when
11 they added the, again, aggressive language -- I became aware
12 of this when they took both steps on March 2nd. They added
13 the very aggressive language and at the same time they
14 removed the carveout from the exculpation clause. So
15 reviewing those two things together was what really
16 initiated the Government's more active involvement in this
17 case.

18 And we were prejudiced because if they had tried
19 to add that -- and I think maybe this is what Your Honor is
20 getting at. Maybe it was the addition of the additional
21 language, the very aggressive language, where we felt
22 prejudiced. Because had the Debtors told us at any time
23 before the confirmation hearing that that's what they
24 intended to seek, we would have had more time to prepare an
25 objection, to raise it with the Court in a timely manner,

1 and to argue it. And as it was, given that they did not
2 propose that --

3 THE COURT: Except that it wasn't the confirmation
4 order that made the proposal, it was the plan. You were on
5 notice from December of 2022 what the Debtors wanted.

6 MR. FOGELMAN: That's correct. That's right.

7 THE COURT: From what you're telling me, you knew
8 what the Debtors wanted. You had no reason to think they
9 were excluding the Government from the scope of that. You
10 filed no objection. They filed a first version of a
11 confirmation order that, unbeknownst to you, had a provision
12 in it that said it wouldn't apply to the Government, which
13 they withdrew two days later. So that provision actually
14 had no effect on whether you objected, whether you had
15 notice of the objection, or anything. Right?

16 MR. FOGELMAN: Well, Your Honor, again, it was my
17 -- because I was not on the line, so to speak, I was not the
18 attorney immediately involved in reviewing filings and what
19 was going on. I can't speak to what my colleague, Mr.
20 Barnea, what discussions he may have had or what he was
21 aware of and when. I just don't know, Your Honor.

22 THE COURT: There's an argument that you would
23 suffer potential irreparable harm without a stay because
24 your appeal might be rendered equitably moot. I assume you
25 don't believe it would be rendered equitably moot, and you

1 would argue to the contrary. Am I right about that?

2 MR. FOGELMAN: We would argue to the contrary.
3 That's right, Your Honor. But again, we are mindful of the
4 caselaw in the Second Circuit that has found equitable
5 mootness when even some number of steps have been taken in
6 furtherance of a plan. And again, while we would dispute
7 that that is applicable, we are certainly mindful that there
8 is litigation risk on that point. And if we're wrong, we
9 may be foreclosed from litigating the merits.

10 THE COURT: So how do I quantify how much your
11 irreparable harm is when basically the only harm you've
12 identified is something that your official position is that
13 you wouldn't suffer?

14 MR. FOGELMAN: Well, Your Honor, I don't think
15 that's entirely fair. Because the other side would tell you
16 that they strongly believe that our -- any governmental
17 enforcement would be equitably mooted.

18 THE COURT: I'm going to ask them their questions,
19 too. Don't worry.

20 MR. FOGELMAN: Okay. Well, look, Your Honor,
21 here's what it is. We don't think equitable mootness should
22 apply. We might be wrong. There's Second Circuit caselaw
23 out there that's not favorable to us. We're very mindful of
24 that. And it's for that reason that we are acting
25 diligently to affect a stay of the confirmation order, or at

1 least this exculpation provision, so that we have a full and
2 fair opportunity to litigate it on the merits. Because if
3 we are equitably mooted, then the Government would be
4 severely prejudiced from its ability to protect public
5 health, safety, and welfare by the exculpation provision.
6 And that is a substantial harm to the public. No matter
7 what percentage you assign to what risk there is on
8 equitable mootness, when you multiply that by the
9 overwhelming and substantial harm to the public -- and no
10 matter how you calculate it, there is substantial harm
11 threatened to the Government if there is not a stay that's
12 granted.

13 THE COURT: Why? You know, the Government hasn't
14 made up its mind whether there's anything wrong here. That
15 much is clear. The instant it makes up its mind that it
16 thinks there's something wrong, it can take action to stop
17 it. And the only thing -- the only thing that my order
18 does, notwithstanding your motion, by the way, which if you
19 read it, you would have no idea what I had actually done.
20 But the only thing my order actually does is say that in the
21 meantime, the people who are doing what I am actually
22 ordering them to do are not incurring liabilities to you for
23 having done so. So how am I threatening the public health
24 or safety by doing that?

25 MR. FOGELMAN: Your Honor --

1 THE COURT: All I'm doing is protecting people who
2 have to do things at a time when, quite frankly, the
3 Government can't make up its mind. That's all I'm doing.

4 MR. FOGELMAN: I don't think that's a fair
5 characterization, Your Honor. First of all, we did
6 specifically address Your Honor's point in that regard by
7 saying that when government's regulators act, it's a rare
8 case when they act prospectively. Much more commonly,
9 crimes happen, civil violations happen, regulatory
10 violations happen. And Congress has defined how long the
11 Government has to investigate the facts of those violations
12 and to pursue whatever claims or violations may have
13 occurred.

14 And so Congress has determined that. We don't
15 think it appropriate for the Court to say (indiscernible)
16 Congress said about how long the Government has to
17 investigate. There is a financial deal happening in this
18 bankruptcy court which did not start until December. And
19 now the plan that was confirmed in the beginning of March.
20 So we're talking at most four months, maybe slightly over
21 three months. I mean, for the Court to say if the
22 Government has any problem with this deal, you must come
23 forward or forever hold your peace, it's just not what
24 Congress authorized, Your Honor.

25 THE COURT: I have not said any such thing. And

1 once again, you prefer to argue in terms of hyperbole
2 instead of in terms of what I have actually done. I have
3 never said that the Government should forever hold its
4 peace. I don't know how I could have been any clearer in my
5 decision and in the language of the order itself to the
6 effect that the instant the Government wants to make any
7 contention here, it is free to do it, and no contention is
8 foreclosed. I have only done one thing.

9 Let's take for example the sales of
10 cryptocurrencies. All right? The plan requires the Debtors
11 to rebalance their portfolios because they can't otherwise
12 make the distributions. And that means purchases and sales
13 of cryptocurrencies. In fact, there is no conceivable way
14 that the Debtors in these cases can be liquidated except by
15 selling cryptocurrencies because that's the only asset they
16 have.

17 Now, the SEC raised some issue as to whether VGX
18 had aspects of the security but was unwilling or unable to
19 take a position as to whether it is a security. So let's
20 say that the Debtors sell cryptocurrencies, including VGX or
21 buy them as part of the rebalancing over the next six weeks.
22 And then the Government finally decides that for whatever
23 reason it thinks that maybe some of those cryptocurrencies
24 should be treated as securities or maybe VGX should be
25 treated as a security. What public health or safety issue

1 am I impinging on by saying that the people who actually did
2 those sales in the meantime under the authority of my order
3 and under the direction of my confirmation order can't be
4 held liable on an ex post facto basis for having done so and
5 what limitation on your protection of the public interest am
6 I imposing by that limited restraint?

7 MR. FOGELMAN: With respect, Your Honor, I
8 understand the Court intended to narrow the order and did
9 provide the additional ability for the Government to go into
10 court at a later date if it determined something was wrong
11 and to seek injunctive or other relief at that time.

12 But the problem with that order is that it
13 insulates conduct that's occurring over the six-week period.
14 And the order is quite broad in its language about
15 everything that is essentially released during that time
16 period.

17 So, for example -- and to answer Your Honor's
18 hypothetical, let's say that crimes are committed or civil
19 violations or regulatory violations in the process of
20 distributing funds to customers. It's certainly conceivable
21 that --

22 THE COURT: You don't seriously think -- look, I
23 made quite clear in what I said that the basis for the order
24 is that people are required by the plan to do certain
25 things, and that's what they're being exculpated from. They

1 are required to transfer cryptocurrencies. So if you think
2 that the very transfer of cryptocurrency is the problem,
3 they'll be protected. But there's nothing in the plan or in
4 my order that requires or authorizes them to commit theft,
5 to lie to people in the course of buying or selling
6 cryptocurrencies, or to commit fraud. And you're making
7 things up by arguing that I have supposedly insulated them
8 from things like that, because you know that I haven't, and
9 you don't think that I have. You -- what you want to do is
10 to protect and to allow the Government to say that the very
11 things, the very act of trading in these cryptocurrencies or
12 the very distribution of these cryptocurrencies might
13 violate some other federal law. You want to reserve the
14 right to argue that, the very thing that the confirmation
15 order requires. And all the rest of this is made up. You
16 know I'm not authorizing those things, and know that nobody
17 would be able to interpret my order as authorizing those
18 other things.

19 MR. FOGELMAN: So I think that the order may have
20 unintended consequences. But let me address the heart of
21 what Your Honor has said, is that the act itself -- you
22 know, you're concerned that the Government would come back
23 and say that the act of the distribution itself is illegal,
24 or a civil violation, or a criminal violation. My response
25 to that is while it's certainly conceivable that that could

1 happen, and I don't think this Court has the power to tell
2 the Government that it can't do that, I mean, certainly one
3 would expect any party subject to such an action to go into
4 court and hold up your confirmation order and say, Your
5 Honor, this was explicitly allowed by the bankruptcy court.
6 The bk court made a finding that we acted in good faith. I
7 mean, it's a hypothetical to say that the Government would
8 actually go in and take that position in the face of this
9 record and in the face of the findings of fact that this
10 Court made --

11 THE COURT: If you say that's a hypothetical, then
12 you're also necessarily saying that your entire irreparable
13 harm argument is in hypothetical.

14 MR. FOGELMAN: Well, look, Your Honor, the problem
15 is --

16 THE COURT: You can't have it both ways.

17 MR. FOGELMAN: Your Honor, the point is we don't
18 know whether there will be civil or criminal violations
19 that are committed. But -- and that's we think ultimately
20 to the extent that the parties -- if anyone is charged or
21 sued civilly, they would be able to raise whatever
22 affirmative defenses they can along the lines of what Your
23 Honor has in mind. And that is in cases under the only
24 provision dealing with exculpation, 1125(e), that's how
25 courts have handled it. They've said, well, this is an

1 affirmative defense. And that's entirely appropriate. And,
2 frankly, we're very mindful that anyone would be able to
3 raise the types of defenses that Your Honor has said.

4 But the problem, Your Honor -- and I know you
5 think it's academic or perhaps we're just reading into this.
6 But the exculpation order is so broad and so capacious that
7 it would include things -- and from my reading of it, if the
8 distribution agent doesn't protect customer privacy
9 information and disclose it, or if the distribution agent
10 negligently loses customer money, or if in the course of
11 performing the "restructuring transactions" there are tax
12 violations which don't require actual fraud, willful
13 misconduct, or gross negligence. There could be KYC
14 violations. There could be anti-money laundering
15 violations.

16 Now again, of course Your Honor did not have that
17 in mind. And I fully understand that this Court is not
18 intending to insulate any such conduct. But I think the
19 order by the nature of it is written so broadly to exclude
20 anyone from liability relating to these restructuring
21 transactions as long as there's no willful misconduct, gross
22 negligence, or actual fraud. And the list of things that
23 come under that -- that may not be captured -- sorry. The
24 list of government actions that may be prevented by that
25 language is substantial. And that is a real and genuine

1 harm. It's not speculative that this order would be in
2 force whenever the confirmation order goes effective that
3 says the Government can't do these things.

4 Now, I don't have a crystal ball. I don't know
5 what's going to happen in the future. I don't know how the
6 parties are going to act in following out the restructuring.
7 But to the extent all they're doing is following Your
8 Honor's literal instructions, I'm certainly appreciative
9 that they're doing that and following Your Honor's
10 instructions and acting, as the Court found, in good faith.
11 And I fully expect that should there be any type of civil,
12 criminal, or regulatory violation resulting from that, that
13 those are the defenses, the affirmative defenses that would
14 be raised.

15 But what the Court doesn't have the authority to
16 do is to in advance, before we know any facts to release it
17 -- so just one more example, Your Honor. In the context of
18 -- if you think about an example where a federal district
19 judge is sued who may have absolute immunity from liability.
20 There's caselaw on that, absolute immunity for judges. Even
21 they are not entitled to a release from suit. There may be
22 facts that pertain to the defense of whether absolute
23 immunity is appropriate given whatever the facts and
24 circumstances are. And so to here, Your Honor.

25 Again, I fully appreciate what Your Honor is

1 trying to do. I'm not disputing that. I'm just saying that
2 the appropriate mechanism to do that is by the party raising
3 a procedural defense, an affirmative defense to say, hey,
4 you can't pursue me for this because the court already found
5 that I was acting in good faith, the court found that
6 whatever findings of fact it made about the appropriateness
7 of the restructuring transactions. And so -- well, I'll
8 leave it there.

9 THE COURT: Okay. You know, the decision that I
10 announced in court and then the written decision that I
11 followed up on, I thought I was very clear that I was
12 relying on authorities that were not third-party release
13 authorities at all and that instead were based on the idea
14 that people are entitled to protection when they are doing
15 not only what a court has authorized or not only what
16 they're doing in a quasi-official capacity, but what a court
17 has explicitly directed that they do.

18 And I cited additional authorities including the
19 Second Circuit's decision in Bradford Audio in the decision
20 that I filed on Saturday. You've argued that you have a
21 likelihood of success on appeal. You haven't discussed a
22 single one of the cases that I cited. Not a single one.
23 Why is that?

24 MR. FOGELMAN: I believe our brief did address
25 some of the cases in the decision.

1 THE COURT: I searched it, and it didn't discuss a
2 single one of them.

3 MR. FOGELMAN: I'm just trying to find the cites
4 for Your Honor if you bear with me a moment.

5 THE COURT: I had cited the Aerodyne case, the
6 Granite Broad. Corp. case, the Latam case, the Murray
7 Metallurgical, Ditech. And then in my written decision, the
8 Bradford Audio decision, Dana Commercial Credit Corp.,
9 Bullion, Phoenician Mediterranean Villa, and In re XRX. And
10 also the T&W Investment Company v. Kurtz case. I cited all
11 of those.

12 MR. FOGELMAN: Your Honor, in Paragraph
13 (indiscernible) of our brief, we did address that none of
14 the cases cited in the decision addressed governmental
15 enforcement actions, let alone criminal actions. And so we
16 did -- we didn't address particular cases. I think it's
17 because the -- the reason we're likely to prevail on the
18 merits is that at the end of the day, there is absolutely no
19 congressional authority for the relief that was given. I
20 don't think there was a citation. The only statute Your
21 Honor cited that gives -- that Your Honor said gives it the
22 authority to give this kind of exculpation was 1142(a).
23 1142(a) said that the Debtor and any entity organized or to
24 be organized --

25 THE COURT: I understand. But you're kind of

1 carving my justification in half when you say that. What I
2 said was the authority was the fact that I was ordering
3 something and parties, by virtue of 1142(a), would have to
4 do what I had approved and ordered in the confirmation order
5 and under these other authorities that I cited it was
6 appropriate that in doing so, they have the security that,
7 as I put it, I am not sentencing them to incur personal
8 liabilities and to subject themselves to kind of a belated
9 argument that what I had told them to do was somehow
10 illegal.

11 MR. FOGELMAN: I understand that, Your Honor. And
12 I would say that I believe those cases address affirmative
13 defenses of qualified immunity. Again, affirmative
14 defenses, not releases provided in advance. And I
15 understand that is a procedural difference, but it's a
16 procedural difference that has substantial import for the
17 Government. We don't dispute that people should be able to
18 raise any affirmative defense from -- exactly from what Your
19 Honor said, from carrying out the plan and complying with --

20 THE COURT: So if my order -- if my order had said
21 exactly the same thing as it said -- so if the proviso that
22 begins in the first paragraph that says to the fullest
23 extent permissible under applicable law. You know, so it
24 was quite clear that, you know, was something that applied
25 to each paragraph, what would your problem be?

1 MR. FOGELMAN: I think it still implies that there
2 is a release that is appropriate and that can be given and
3 that the Court it sounds like is very much intending to
4 give. And again, my concern and the Government's concern is
5 that there's no statutory authority to grant a release. The
6 cases that Your Honor cited deal with affirmative defenses
7 that could be raised. Your Honor didn't say parties can
8 raise any affirmative defenses based on following my orders.
9 The Court instead said the government was released from
10 anything to do with --

11 THE COURT: Let's focus very specifically on the
12 very fact, the mere fact of doing rebalancing transactions
13 and distributing cryptocurrency.

14 MR. FOGELMAN: Okay.

15 THE COURT: Are you saying that parties should not
16 be exculpated just for doing those things and that you
17 should have the right to punish them later for claiming that
18 just those things, for example, are violations of securities
19 laws? Is that what you're contending?

20 MR. FOGELMAN: So let me be clear. My contention
21 is that there is no entitlement to a release for the
22 Government enforcing the law, and that the Government has
23 the time that Congress gave under whatever applicable
24 statute of limitation there is to evaluate if a transaction
25 is problematic and to take any regulatory or enforcement

1 steps that might be warranted.

2 However, I also am recognizing that, as Your Honor
3 has indicated, the parties are following the order of the
4 Court. I am mindful of the fact-finding that the Court has
5 made that the parties have been acting in good faith. And I
6 certainly anticipate that if anyone brought any kind of
7 action based on what the Court is directly ordering those
8 parties to do, that those parties would hold up the Court's
9 findings of fact, orders in the case, and say hey, what's
10 the Government doing here. I fully appreciate that.

11 And so -- but where we have a substantial problem
12 and disagreement is the power of the Court to not just make
13 findings of fact and conclusions of law -- which, look,
14 courts deal with all the time in terms of res judicata,
15 collateral estoppel, and any other affirmative defenses that
16 might be applicable. But to turn around and give what
17 really is in substance a third-party release or a release to
18 the Debtors who are liquidating and don't even get a
19 discharge for their future actions that haven't even
20 occurred yet or the government doesn't even know what
21 they're going to do or how they're going to do it, that's
22 the fundamental problem, Your Honor.

23 THE COURT: Let me ask the Debtors. Why do you
24 contend that an appeal here would be equitably moot if there
25 isn't a stay order?

1 MR. SLADE: I think it's equitably moot, Your
2 Honor, under the caselaw precisely for the reasons that
3 you've described. Because we are acting under color of the
4 Court's order. And Mr. Fogelman's argument that we don't
5 know what we're going to be doing, I mean, that's just
6 wrong. The transactions are described in detail in the
7 plan, the confirmation order, and in the documents that we
8 submitted that Your Honor authorized us to do. So we are
9 going to be doing that. And so when we're on appeal if
10 they're challenging these same arguments, we are going to
11 say we are following the Court's order, we are doing exactly
12 what we told the world that we would do, and the Government
13 didn't object. And for that precise reason, the exculpation
14 clause can't be stricken because the argument is equitably
15 moot.

16 For similar reasons that other confirmations have
17 been -- appeals have been dismissed on equitable mootness
18 grounds because parties are taking action and relies on the
19 Court's order, that's a traditional ground for a finding of
20 equitable mootness, and that's exactly the similar argument
21 that we are going to be making.

22 And I wanted to be very clear in our brief, and
23 I'm just going to say it now. And our position is not
24 wishy-washy at all. Our position is once Your Honor gives
25 us authority to go forward with the transaction, we're going

1 to do that. And then we're going to argue that appeals are
2 equitably moot for the same reason that we need the
3 exculpation clause in the first place, which is to protect
4 the people that are relying on Your Honor's order from the
5 same sorts of concerns that Mr. Fogelman is talking about.

6 He's saying specifically it's conceivable the
7 Government might come after us after the fact for executing
8 exactly what we told Your Honor we would be doing. That is
9 not appropriate. That is not appropriate. People need to
10 be able to rely on the court's order. And that's why these
11 issues are inextricably intertwined.

12 THE COURT: And if an appellate court were to
13 decide tomorrow that this provision should be stricken, are
14 you saying you wouldn't proceed?

15 MR. SLADE: I'm not sure what we would do, Your
16 Honor. I think it's a significant issue. And we would have
17 to decide whether or not we're going to go forward with the
18 plan at all and whether we would have to convert the case.
19 I mean, the question is whether the professionals that are
20 going to be doing these things are willing to take these
21 actions when the Government can't make up its mind on what
22 to do with crypto.

23 I mean, Your Honor experienced during the
24 confirmation hearing exactly what the crypto community has
25 been experiencing for years. The Government can't make up

1 its mind, and they won't give anybody a straight answer,
2 including today. So there might be some people that are
3 willing to take the risk that the Government is going to go
4 after them after the fact and they're going to have to rely
5 on the affirmative defense that Mr. Fogelman mentions. I'd
6 have to talk to my malpractice carrier before I was willing
7 to take that risk.

8 But his argument that that's what we should be
9 relying on, the ability to take action after the fact, that
10 doesn't give anybody any comfort. I mean, the concern is
11 that the decisions that the Government is going to make in
12 the future are going to be driven by politics, not by law.
13 I think what we've experienced totally validates those
14 concerns 2,000 percent.

15 So Your Honor asked if we're going to convert the
16 case if we don't get exculpated. I'm not sure I can answer
17 that question. It's hypothetical. But it's a real
18 possibility. And I think we would have to think seriously
19 about it.

20 Just think, for example, about the plan
21 administrator. He is a clear target of the United States
22 Trustee's Office. They do not want him to be exculpated.
23 Would you take that job, Your Honor, if there weren't
24 protections on the front end? I'm not sure anybody would.

25 MR. FOGELMAN: Your Honor, if I can just respond

1 briefly. There is a million commercial deals that happen
2 outside of the bankruptcy context every day where parties
3 necessarily have to think about the risk, evaluate the legal
4 landscape, certain or uncertain, whatever it may be, and
5 decide what to do.

6 The idea that for an action that's going to happen
7 in the future debtors need a blessing from the Court that no
8 matter what they do in carrying out that deal or the deal
9 itself, that they can't be liable, I mean, there's no
10 precedent for that.

11 Look, think about a consent decree in any federal
12 district court. There are plenty of district court consent
13 decrees that have complicated actions that are going to be
14 going forward based on whatever arrangements the parties
15 have made that a court is also so ordering just by virtue of
16 so ordering it. You know, I am not aware of any consent
17 decree where a court has -- and by the way, in doing this,
18 you can't be liable to any government regulator. But
19 presumably if someone went after them, they would go back to
20 court and hold up that consent decree. But the idea that
21 the Debtors here need some type of special treatment or some
22 assurance, I mean, they're businesspeople. They make those
23 decisions every day all the time as they did before the
24 bankruptcy. So it's just -- I'm not sure how much it
25 advances their point to say that they are having a hard time

1 making up their mind here what to do in the absence of
2 exculpation.

3 MR. ASMAN: Your Honor, it's Darren Asman from
4 McDermott for the Committee. May I be heard briefly on
5 this?

6 THE COURT: Yeah.

7 MR. ASMAN: Your Honor, everything that you just
8 heard Mr. Slade say is the exact reason why the public
9 interest element counsels against granting a stay. If the
10 Government is correct -- and they are not -- then
11 practically no Chapter 11 plan would be consummated out of
12 fear of prosecution by governmental agency and the entire
13 purpose of Chapter 11 would be defeated. This is not an
14 out-of-court commercial transaction. The whole purpose of
15 bankruptcy is finality. That is why we get court orders.
16 That is why we get a plan that is confirmed by a federal
17 bankruptcy court. The whole integrity of the Chapter 11
18 process far outweighs the Government's desire to preserve
19 its optionality as to whether to prosecute the estate, the
20 debtor, the plan administrator, law firms, financial
21 advisors who are acting under a federal court order for
22 hypothetical violations of securities laws that no one has
23 articulated.

24 We don't accept this proposition that essentially
25 every order Your Honor enters in a bankruptcy case has a big

1 asterisk at the end of it that says, but watch out, the
2 Government might sue you on this. The Government gets
3 notice of everything in this case just like every other
4 interested party. They can either come forward or stay
5 silent. They have not actually stayed silent here, but
6 effectively they have stayed silent here. They haven't
7 articulated anything that is illegal about this plan, and
8 that is on them.

9 THE COURT: I've read all of the papers and
10 considered them in detail. And I don't think that they
11 warrant a stay. But I am very concerned that a district
12 judge who will be picking this up, who won't already be
13 familiar with the entire history of exculpation provisions
14 in bankruptcy court, for example, I am very concerned about
15 pleasing a district judge who might be presented with this
16 same stay application to the extent that I deny it. And our
17 stay is actually expiring in an hour and five minutes, which
18 is less time -- I think an hour and five minutes. Maybe two
19 hours and five minutes. That's actually less time than it
20 will take me to issue a ruling that I think I should issue
21 on this so the district court can consider it.

22 So let me ask the Debtors and the other parties.
23 I didn't grant the 14-day stay that ordinarily would have
24 been in effect. It's continued only through today. What
25 would be the big deal about extending it through Monday just

1 out of consideration for the timing of the district court
2 and so the district court can have the time to actually read
3 all of these papers and to actually read my decision and not
4 be confused as to what it is that I actually did and why I
5 did it.

6 MR. SLADE: Your Honor, Mike Slade for the
7 Debtors. The Debtors do not intend to close a transaction
8 this week, as I said when we were on the phone yesterday.
9 At Your Honor's request, we would be okay extending the stay
10 until then so that Your Honor can render a ruling. That's
11 fine with us.

12 THE COURT: Okay.

13 MR. ASMAN: Your Honor, the Committee is okay with
14 that as well. We understand the concern and we want you to
15 make a good record for the district court.

16 THE COURT: Well, I think in fairness to the
17 district court, they should understand my thinking of the
18 points.

19 MR. MORRISSEY: Your Honor, if I may. Richard
20 Morrissey for the U.S. Trustee. I just wanted to add some
21 color to the issue of the plan administrator and also remind
22 the Court of the sequence of events with respect to the plan
23 administrator.

24 The plan administrator was added to the list of
25 exculpated parties after the hearing had been concluded.

1 The plan administrator had an agreement to limit his
2 liability, a separate agreement. So the Government
3 certainly did not have an opportunity to object to the
4 addition of the plan administrator. I just wanted the Court
5 to be --

6 THE COURT: So wait a minute. The plan
7 administrator just replaced the original concept of a
8 winddown trustee and the exculpation provision to be applied
9 to the plan administrator is the same as what was proposed
10 for the party that he is replacing. Isn't that the correct
11 case?

12 MR. MORRISSEY: Your Honor, actually I'm not sure
13 about that. Perhaps one of the attorneys can confirm that.
14 Because there was a change between the winddown trustee who
15 became the winddown debtor. Somewhere along the --

16 THE COURT: Basically they changed entities,
17 names, titles, concepts. But the functions to be performed,
18 I think they were always all within the same exculpation
19 provision, weren't they. Isn't that right, Mr. Slade?

20 MS. OKIKE: Your Honor, Christine Okike on behalf
21 of the Debtors. That's correct. The winddown trustee was
22 just changed to the plan administrator. It was just a
23 change in the title.

24 THE COURT: I'm going to issue a decision as
25 quickly as I can. And I would really attempt to get

1 something on file tonight. But what do we do about the
2 current stay? Will everybody agree that it's stayed until
3 Monday even if we don't get an order on file by 5:00? Do
4 you want to quickly put together such an order? What do you
5 want to do?

6 MR. SLADE: Your Honor, Mike Slade for the
7 Debtors. We can send you an order similar to the one we
8 sent you the last time that extends through Monday at 5:00
9 if that would be okay with the Court.

10 THE COURT: Okay. That would be fine. Let's do
11 that right away. Do you need -- share it with the
12 Government so they can see it. Okay?

13 MR. SLADE: Yes. I will send it to them in the
14 next ten minutes.

15 THE COURT: All right. In that case, I know there
16 are a lot of arguments to be raised. I think I understand
17 them all. And I'm not trying to cut people off, but more
18 important, I think that I get my own thinking down for the
19 benefit of the district court. And I think I understand all
20 the other arguments. But is there anything else with that
21 statement that anybody else wants to say today?

22 MR. SLADE: Nothing for the Debtors, Your Honor.
23 Thank you.

24 MR. ASMAN: Nothing for the Committee, Your Honor.
25 Thank you very much for your time.

1 MR. FOGELMAN: Nothing from the United States,
2 Your Honor.

3 MR. MORRISSEY: And nothing from the U.S. Trustee.
4 Thank you, Your Honor.

5 THE COURT: All right. Thank you all very much.
6 I'll look for the stay order and I'll get something on file
7 this week.

8 (Whereupon these proceedings were concluded)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

A handwritten signature in cursive script that reads "Sonya M. Ledanski Hyde".

Sonya Ledanski Hyde

Veritext Legal Solutions

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Date: March 16, 2023

[& - agreed]

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